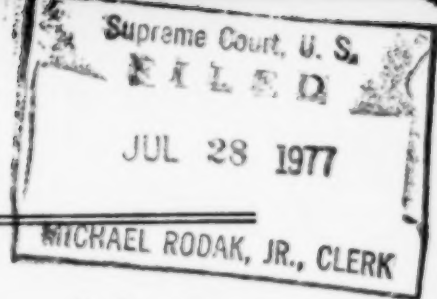


77-22



IN THE

Supreme Court of the United States

October Term, 1977

No. 77-.....

RUTH H. BUNN, Executrix of the Estate of
Clair V. Bunn, Deceased,
Petitioner,

vs.

CATERPILLAR TRACTOR COMPANY,
a corporation,
Respondent,

vs.

ACE DRILLING COAL COMPANY, a corporation,
and
SOUTH FORK EQUIPMENT COMPANY, INC.,
a corporation.

**BRIEF OF RESPONDENT CATERPILLAR TRACTOR
COMPANY IN OPPOSITION TO PETITION OF RUTH
H. BUNN, EXECUTRIX OF THE ESTATE OF CLAIR V.
BUNN, DECEASED, FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT**

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INDEX.

	Page
Question Presented	1
Statement of the Case	2
Reasons Why the Petition for Writ of Certiorari Should Be Denied	7
I. Contrary to the contentions of petitioner, the United States Court of Appeals for the Third Cir- cuit has not in the instant case decided an important state question in a way in conflict with applicable state law	7
Conclusion	21
Appendix:	
Complete text of letter from Robert S. Grigsby, Esquire, to T. F. Quinn, Clerk of the United States Court of Appeals for the Third Circuit dated March 21, 1977	22
Complete text of opinion of Court of Common Pleas of Allegheny County, Pennsylvania, in <i>Azzarello v.</i> <i>Black Brothers Co., Inc.</i> at No. 924 April Term, 1972 (filed December 10, 1975).....	24

TABLE OF CITATIONS.

CASES.

Azzarello v. Black Brothers Co., Inc., No. 924 April Term, 1972, affirmed <i>per curiam without opinion</i> by the Superior Court of Pennsylvania 240 Pa. Super. 956, 359 A.2d 897 (1976)	15,17,18,21
Bellettiere v. City of Philadelphia, 367 Pa. 638, 81 A.2d 857 (1951)	16
Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 337 A.2d 893 (1975)	8,9,10,11,13,14,17,19,20,21

II.

	Page
Berkshire Land Co. v. Federal Security Co., 199 F.2d 438 (C.A. 3, 1952).....	18
Beron v. Kramer-Trenton Co., 402 F.S. 1268 (1975), affirmed by the Court of Appeals for the Third Circuit on June 22, 1976, No. 75-2407.....	11,13,14,15
Cornell Drilling Co. v. Ford Motor Company, 241 Pa. Super. 129, 359 A.2d 822 (1976).....	19,21
Francioni v. Gibsonia Truck Corp., Pa., 372 A.2d 736 (1977).....	19,21
King v. Order of United Commercial Travelers of America, 333 U.S. 153, 68 S. Ct. 488, 92 L.Ed. 608 (1948).....	18
Kuisis v. Baldwin Lima Hamilton, 457 Pa. 321, 319 A.2d 914 (1974).....	20
Lenkiewicz v. Lange, 242 Pa. Super. 87, 363 A.2d 1172 (1976).....	19,21
Micozzi v. Klysh, 207 Pa. Super. 77, 215 A.2d 263 (1963)	16
Mohr v. Plotkin, 186 Pa. Super. 615, 142 A.2d 414 (1958)	16
Moss Rose Manufacturing Co. v. Foster, 226 Pa. Super. 448, 314 A.2d 25 (1973).....	16
Oehler v. Davis, 223 Pa. Super. 333, 298 A.2d 895 (1972)	20
Seidel v. Borough of Yeadon, 19 Pa. Super. 370, 155 A.2d 370 (1959).....	16
Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966).....	2, 7

RULE.

Federal Rule of Appellate Procedure 30(b).....	3
--	---

MISCELLANEOUS.

§ 402A of the Restatement of Torts 2d....	2,7,9,10,13,15,19
9 Standard Pennsylvania Practice	16,17,18

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Question Presented

Whether the United States Supreme Court should intervene when the United States Court of Appeals for the Third Circuit

refuses to accept a plaintiff's contention in a product liability case that an opinion joined in by only two justices of the Supreme Court of Pennsylvania effected a drastic change in the Pennsylvania law of product liability where there has been no further Pennsylvania appellate discussion or decision on the specific issue presented and, furthermore, where decisions of the Pennsylvania Supreme Court confirm that an opinion joined in by only two justices of said Court is not binding precedent even upon the state Courts of Pennsylvania.

Statement of the Case

This action was brought against defendant Caterpillar Tractor Company (hereinafter "Caterpillar") arising out of the death of Clair V. Bunn on October 11, 1973. Mr. Bunn was a supervisory employee of Ace Drilling Coal Company who died when allegedly a Caterpillar 988 Wheel Loader being operated by a fellow employee under Mr. Bunn's direction backed over him. Plaintiff's action was solely for allegedly defective design which is encompassed within § 402A of the Restatement of Torts 2d (hereinafter § 402A). § 402A was specifically adopted by the Supreme Court of Pennsylvania in *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966). Plaintiff contended the alleged "defects" were as follows: (1) the Wheel Loader was not equipped with a rear-view mirror; (2) it was not equipped with a functioning backup alarm; and (3) the position of the air cleaner and exhaust were such as to block partially the operator's view to the rear. There was *never* a contention made during the trial that the Wheel Loader malfunctioned or that it operated in any way other than the way it was supposed to operate. It was neither alleged nor contended that the machine was defec-

tively manufactured. It was neither alleged nor contended that anything on the machine "broke" or "fell" or "snapped" or "failed" or did anything except what it was supposed to do.

The testimony at trial disclosed the following facts as to how the accident occurred.¹

Michael R. Bolvin, a driller, worked with plaintiff's decedent, Mr. Bunn, at Ace Drilling Company (p. 3).² Bunn was in charge of the operation (p. 8) which involved the use of two 988 Wheel Loaders (p. 7) and nine men (p. 8). The work involved was the loading of coal into railroad cars, which operation involved repetitive backward and forward motions of the Wheel Loaders. Just before the accident, Bolvin was conferring with Bunn who had his back toward the Wheel Loader operated by Richard Rickard (p. 19). Bolvin, after receiving his instructions from Bunn, began to walk away from him (p. 20). He had gone about 10 or 15 feet (p. 20) when the noise made by the Wheel Loader caused him to turn around (pp. 21, 23), at which time he saw Bunn lying on the ground (p. 21) between the left front and rear wheels of the machine (p. 22). At that point Bolvin saw no evidence the machine had gone over Bunn (p. 22). Bolvin was then about

¹ The references are to pages in the original notes of testimony. When appellant below (petitioner herein) served a designation under Federal Rule of Appellate Procedure 30(b) of the proposed contents of her Appendix below, counsel for Caterpillar timely served upon appellant under said Rule a designation of additional testimony Caterpillar deemed necessary for inclusion in said Appendix, including testimony of Richard Rickard, the operator of the Wheel Loader, and Michael Bolvin, a fellow worker and eyewitness to the accident. Despite Caterpillar's designation, however, appellant/petitioner refused to include this factual testimony in the Appendix.

² All of the page references in this paragraph are to pages in the notes of testimony of Michael R. Bolvin given at trial on February 11, 1976, which is of record in this case.

20 feet from the Wheel Loader (pp. 23, 40). Bolvin ran toward the machine, which was then going in a forward motion (p. 40). He couldn't testify whether Bunn cried out or not because the machine was so noisy (p. 40), but he saw the left rear wheel of the machine on its forward motion scrape the side of Bunn's face and body (p. 40) before Bolvin was able to alert the driver and get the machine stopped (p. 41). Bolvin testified he knew the backup alarm on the machine was not functioning that day because he didn't hear it (p. 49). However, the sound of the machine's engine as it approached was so loud Bolvin instinctively turned around when he heard it (p. 50). There was nothing to block one's vision between the spot where he and Bunn had been talking and where the machine was being operated by Rickard (p. 50). Bunn had traveled some distance from the spot where he and Bolvin had talked to the spot where his body was found (p. 51). If Bunn had been walking in a *forward* motion between these two points (where he and Bolvin talked and where the accident occurred) he would have been able to see the 988 coming in a rearward direction toward him (p. 58). Even with all of the noise in the area Bolvin could distinguish the sound of the 988 Wheel Loader coming toward him (p. 54) and recognized the sound as the 988 (p. 55). He acknowledged that he (and, of course, Bunn too) shouldn't have been in that area because it was around a moving piece of equipment (p. 55). He and Bunn knew that where they were talking was near the rearward path of the 988 in its normal repetitive pattern that day (p. 56).

Richard Rickard, the operator of the 988 involved, testified that he didn't know where Bunn was when the 988 came in contact with him (p. 3)³ but that 10 to 15 minutes

³ All of the page references in this paragraph are to pages in the notes of testimony of Richard Rickard on recross examination given at trial on February 11, 1976, which is of record in this case.

before the accident he had told Bunn (his foreman) to stay out of the way because he (Rickard) couldn't see him and concentrate on what he was doing (p. 3). He and Bunn both knew that when used in a mining field the machine should have an audible backup alarm (pp. 3, 4). Bunn, the foreman, knew the backup alarm wasn't working but he told Rickard to go ahead and use the machine anyway (p. 4). This was prior to the time Rickard told Bunn he couldn't see him and asked that he stay out of the way because Rickard couldn't concentrate on Bunn and also operate the machine (p. 4). Rickard testified that if the 988 had had sideview mirrors at the time of the accident he wouldn't have used them anyway because he couldn't see as well using them (mirrors were installed by Ace Drilling Company after the accident) as he could by turning around and looking out the back of the machine (p. 4). Rickard also testified that by moving his head just a little to one side he could see past the exhaust stack and air cleaner (pp. 4, 5). Rickard acknowledged that there is a blind spot directly behind the machine and he testified that Bunn, who had operated the machine, also knew about the blind spot (pp. 5, 11). Just before the accident occurred, before Rickard began to move the 988 in reverse, he looked to the rear and on both sides of the air cleaner and stack and he did not see Bunn (p. 6). From where Bunn was standing (based upon location of his body after the accident) there was nothing to obstruct Bunn's view of the approaching machine (p. 7). The blind spot referred to was right up close to the machine and if Bunn had stayed where he and Bolvin had been talking, based upon Bolvin's testimony, Rickard could have seen him (p. 10). A person in the blind spot would be so close to the machine he could feel the heat from the engine (pp. 12, 13).

It was undisputed that the 988, originally sold by Caterpillar in 1969, was not equipped with rearview mirrors. The

988 also did not contain a backup alarm when originally sold, but a backup alarm had been completely installed on the machine by an employee of Ace Drilling Company several weeks *before* the accident (Testimony of Raymond C. Good, p. 4). According to Messrs. Bolvin's and Rickard's testimony, however, the alarm was not operating on the day of the accident and although Bunn knew this he ordered Rickard to operate the machine anyway (Rickard's testimony, p. 4).

The case was tried before the Honorable Daniel P. Snyder and a jury in the United States District Court for the Western District of Pennsylvania. The case was submitted to the jury on special interrogatories, the first of which was:

"Was the Caterpillar 988 Wheel Loader in a defective condition at the time it was sold by Caterpillar Tractor Company to Cecil I. Walker Company, West Virginia, [the original owner] on January 28, 1969?"

After due deliberation the jury answered that question "No." Thus, after consideration of the testimony, the jury found the Wheel Loader was *not* in a defective condition at the time of sale⁴ and a judgment was entered in favor of defendant Caterpillar. Plaintiff thereupon filed a motion for new trial, which motion was denied in an opinion and order dated June 16, 1976. Plaintiff thereupon appealed to the United States Court of Appeals for the Third Circuit which by judgment order dated April 6, 1977 affirmed the judgment of

⁴ In her petition to this Honorable Court, petitioner contends that "[T]he jury's answer determined that the defect in the machine which caused the fatal accident was not of that magnitude" [i.e., not "unreasonably dangerous"] (Petition for Writ of Certiorari, p. 4). *This is clearly not correct.* The jury in fact found there was *no defect*, not, as petitioner would have this Court believe, that there was a defect that was only "reasonably dangerous". Petitioner, in effect, "presumes" a defect from the happening of the accident. The finders of fact found otherwise.

the district Court. Plaintiff's petition for rehearing was denied May 4, 1977. Plaintiff then petitioned for a stay of the mandate and a stay was granted until June 10, 1977 to allow plaintiff to prepare and file a petition for writ of certiorari to this Honorable Court. Said petition was received by counsel for Caterpillar on June 30, 1977.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

I. Contrary to the contentions of petitioner, the United States Court of Appeals for the Third Circuit has not in the instant case decided an important state question in a way in conflict with applicable state law.

The trial judge in the instant case charged the jury using verbatim language of § 402A of the Restatement of Torts 2d, adopted by the Supreme Court of Pennsylvania in *Webb v. Zern, supra*. That section reads in part as follows:

"One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer . . ."

Throughout the appeal, and in her petition to this Honorable Court, plaintiff/petitioner contends that the trial judge erred simply because he included the words "unreasonably dangerous" (as contained in § 402A) in the phrase "defective condition unreasonably dangerous" in his charge to the jury. This contention is based *solely* on the opinion of two justices of the Pennsylvania Supreme Court in

Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 337 A.2d 893 (1975).⁵

In *Berkebile*, then Chief Justice Jones of the Pennsylvania Supreme Court wrote, with only Justice Nix concurring with his opinion:

"We hold today that the 'reasonable man' standard in any form has no place in a strict liability case. The salutary purpose of the 'unreasonably dangerous' qualification is to preclude the seller's liability where it cannot be said that the product is defective; this purpose can be met by requiring proof of a defect. *To charge the jury or permit argument concerning the reasonableness of a consumer's or seller's actions and knowledge, even if merely to define 'defective condition' undermines the policy considerations that have led us to hold in Salvador [Salvador v. Atlantic Steel Boiler Co., 457 Pa. 24, 319 A.2d 903 (1974)] that the manufacturer is effectively the guarantor of his products safety. The plaintiff must still prove that there was a defect in the product and that the defect caused his injury; but if he sustains this burden, he will have proved that as to him the product was unreasonably dangerous. It is therefore unnecessary and improper to charge the jury on 'reasonableness' . . .*" 337 A.2d 893, 900 (Emphasis added).

Assuming *arguendo* that the above is now the law of Pennsylvania, and that is doubtful as discussed below, a review of the trial judge's charge in the instant case reveals he did *not* charge on the "reasonableness of a consumer's or seller's actions and knowledge" as referred to in *Berkebile* or on

⁵ In her petition to this Court, petitioner claims additional Pennsylvania appellate authority for her contention, but in fact there is none, as is more fully discussed herein. Petitioner also cites (R. 21 of petition) excerpts from notes of a subcommittee which drafted proposed jury instructions, which have not been adopted. Clearly these subcommittee notes have no binding effect.

"reasonableness" of the defect, if any. Although he quoted from the language of § 402A, including the words "defective condition unreasonably dangerous to the user or consumer" (Appendix,⁶ pp. 405a, 410a, 414a) he did not charge that the jury could find the Wheel Loader was "reasonably defective" or "reasonably dangerous" and yet absolve Caterpillar from liability. It is clear from the charge taken as a whole that the phrase "defective condition unreasonably dangerous" was given as a unitary concept to aid the jury, as intended by the drafters of the Restatement, to determine whether or not the design was defective. For example, at page 73 of the charge (p. 405a) the trial judge referred to plaintiff's contention the Wheel Loader "was defective in design . . . which rendered it unreasonably dangerous" (the latter flowing automatically from the former) and again that the Wheel Loader "was defective *and* unreasonably dangerous" (p. 405a) (Emphasis added). Unlike cases wherein there are allegations of malfunction or of manufacturing defects,⁷ in an allegedly defective design case how is the jury to determine what is defective design unless they receive some guidance from the Court, guidance lifted directly from § 402A? The jury here was not asked to make a determination whether a defective condition was "reasonable." The jury was asked to decide whether defendant's design was "defective."⁸ In fact, questions 1 and 2

⁶ References to page numbers followed by "a" are to pages in the Appendix in the Court of Appeals.

⁷ It is important to distinguish *Berkebile*, *supra*, from the instant case because *Berkebile* involved claims of not only defective design but also claims of defective manufacture, inadequate warnings, and misrepresentation of the safety of the machine. Those latter claims were not involved in the instant case.

⁸ The Court's attention is respectfully invited to the fact that it could hardly be contended, and it was *not* contended, by Caterpillar or anyone else that the Wheel Loader, *if defective*, was not also unreasonably dangerous. Such a position would be untenable, if only because of the size of the machine. It would seem clear to anyone that *if* the Wheel Loader was defectively designed it was also unreasonably dangerous.

submitted to the jury in this case (p. 428a) are precisely the two questions referred to by Chief Justice Jones in *Berkebile* (1) was the product defective and (2) was the defect the proximate cause of the injuries? 337 A.2d 893, 898.

Chief Justice Jones in *Berkebile* acknowledges the validity of comment (i) to § 402A (337 A.2d 893, 899) which was in substance included in the trial judge's charge in this case (pp. 412a, 413a). Comment (i) is based upon common sense and acknowledges that "[m]any products cannot be made entirely safe for all consumption. . . ." The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. § 402A Restatement, Comment (i). The Comment refers to whiskey, sugar, and tobacco among other things, as items that cannot be made entirely safe for all consumption. In *Berkebile*, Chief Justice Jones acknowledges this:

" . . . the plaintiff cannot recover if he proves injury from a product absent proof of defect, such as developing diabetic shock from eating sugar or becoming intoxicated from drinking whiskey." 337 A. 2d 893, 898.

* * *

"The seller of a product is not responsible for harm caused by such inherently dangerous products as whiskey or knives that despite perfection in manufacture, design or distribution, can cause injury." 337 A.2d 893, 899.

It is, of course, impossible to design a Wheel Loader which is incapable of injuring someone. It is a huge machine operated by a fallible human being, with possibly other fallible human beings working around it. Like a knife it has inherent capacity to injure in the hands of a human being. This capacity arises not necessarily from any defect in the machine

but arises because human beings are fallible. If a Wheel Loader is capable of *moving* it is capable of injuring someone. Thus it falls squarely within the category of products referred to in Comment (i) and the instruction based upon that comment was proper and necessary "to differentiate those products which are by their very nature unsafe but not defective from those which can truly be called defective." *Berkebile*, *supra*, 337 A.2d 893, 899.

The issue raised by plaintiff in the instant case is precisely the one faced by the U. S. District Court for the Eastern District of Pennsylvania in *Beron v. Kramer-Trenton Co.*, 402 F.S. 1268 (1975), affirmed by the Court of Appeals for the Third Circuit on June 22, 1976, No. 75-2407. That case, like the instant one, was based purely on allegedly defective design and plaintiff in his motion for new trial argued that the trial Court had erred in using the "unreasonably dangerous" language in its charge in view of the *Berkebile* decision.⁹ In a scholarly and well-reasoned opinion, Judge Huyett while acknowledging that a "duty rests upon the federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court" (402 F.S. 1268, 1272) held that the simple use of the words "unreasonably dangerous" does not constitute reversible error. The following excerpts from Judge Huyett's opinion are particularly pertinent and, it is submitted, compelling in their logic and reason:

⁹ One item in *Beron* distinguishes it from this case. In footnote 5 of the opinion, discussing a dialogue with the jury after verdict Judge Huyett speculates that the jury might in that case have found a "mere defect . . . which is not unreasonably dangerous to the user." 402 F.S. 1268, 1271 (fn. 5). Nothing in the instant case, either in the charge or anywhere else, indicates the jury here might have found a "mere defect." The jury here found *no* defect.

"Since the Court [in *Berkebile*] does not disavow § 402A and since 'unreasonably dangerous' is not expressly deleted, it may be that a jury charge, carefully phrased so that the danger that fault notions will influence the jury is minimized, would survive scrutiny under *Berkebile*."

* * *

"... an examination of Pennsylvania appellate decisions interpreting § 402A reveals that the test and the comments, including in particular comments g, h and i, have been solidly engrafted into Pennsylvania law without reservation. *In the absence of an unequivocal rejection of any specific aspect of § 402A by a majority of the Pennsylvania Supreme Court we hesitate to impute such an intention to that Court.* . . . We believe that the phrase 'defective condition unreasonably dangerous to users' is a unitary concept and that the purpose of the draftsmen would be frustrated by severing from it 'unreasonably dangerous' without substituting another suitable phrase which tends to clarify the meaning of 'defective condition.' In our view the inclusion of 'unreasonably dangerous' serves two overlapping functions in the § 402A formulation of strict liability. We believe it denotes that the draftsmen of the Restatement intended to foreclose the possibility that 'defective condition' might be construed to include any characteristic of a product capable of inflicting injury. In addition, it signifies that jurors should not resort to their intuitive understanding of 'defective condition' but rather that they should be guided by an objective standard based on community expectations of product safety . . ."

* * *

"In the decade since § 402A was adopted the Pennsylvania Supreme Court has expressed unqualified approval for the language and the comments of § 402A, where doubts arose as to its proper interpretation [foot-

note omitted]. By contrast, the Pennsylvania high court has *never* rejected the language of the comments." 402 F.S. 1268, 1273-74. (Emphasis added.)

* * *

"... in a 402A case where the jury is asked to determine whether a product was in a defective condition, a jury would have to resort to bare intuition if it were given no standard by which to gauge whether a particular product was sold in a defective condition. . . . No constructive social policy would be fostered by permitting juries with an overly broad intuitive understanding of defective condition to render the seller of a product an insurer against any and all injuries thereby caused. . . . Despite the use of words that in a sense 'ring in negligence,' careful jury instructions modeled after comments g, h and i of § 402A properly focus the jury's attention on the *condition* of the product; the *conduct* of both the seller and the consumer are made irrelevant. In that sense, then, the essential distinction between negligence and strict liability is preserved." 402 F.S. 1268, 1275-76. (Emphasis in original.)

In the instant case the trial judge very specifically instructed the jury that § 402A applied "although the seller has exercised all possible care in the preparation and sale of his product" (p. 410a) and, as stated above, there was no portion of the charge in the § 402A aspect of the case which dealt with the "reasonableness" of the *conduct* of the seller or consumer. The focus at all times was on the *condition* of the Wheel Loader and the question to be answered was "Was it defective?"

There is another compelling reason why *Berkebile* should not and cannot have the effect petitioner seeks to give it. Although the Pennsylvania Supreme Court was unanimous in declaring in *Berkebile* that the trial Court had erred and that there should be a new trial, only two of the seven justices (Chief Justice Jones and Justice Nix) signed the opinion of the

Court. Justice Pomeroy wrote a separate concurring opinion (stating the lack of adequate warnings may make a perfectly made product "unreasonably dangerous" 337 A.2d 893, 904) as did Justice Roberts. Justices Eagan, O'Brien and Manderino merely concurred in the result.

Here, again, the opinion of District Court Judge Huyett in *Beron, supra*, is compelling in its analysis of the effect of this two-justice opinion:

"Since we draw no inferences from the concurring opinions or from the unexplained concurring votes, the *Berkebile* opinion represents the personal views of only two members of the Court, less than a majority of those justices of the Pennsylvania Supreme Court sitting on the case. Consequently we accord no precedential value to the opinion, and we treat Pennsylvania strict liability law as unchanged. *Burak v. Commonwealth*, 339 F. Supp. 534 (E.D.Pa. 1972).

"Our approach is fully consonant with Pennsylvania's own law concerning the precedential weight of its less than majority opinions. In *Commonwealth v. Little*, 432 Pa. 256, 248 A.2d 32 (1968), the Pennsylvania Supreme Court declined to follow a prior opinion which represented the views of only two justices in a four man majority, stating: '[t]hat opinion, joined by only one other member of this Court, has no binding precedential value.' 432 Pa. at 260, 248 A.2d at 35. Several years later the Court, refusing to rely on a minority opinion, stated that such an opinion 'did not express the views of a majority of the Court, and, therefore, is not decisional.' *Commonwealth v. Silverman*, 442 Pa. 211 (n.8), 275 A.2d 308 (n.8) (1971)" 402 F.S. 1268, 1276.

* * *

"... we think the Pennsylvania Supreme Court would take the following approach: in interpreting the split opinion of a Pennsylvania appellate court one must add

up the votes on each issue addressed by an opinion of the court; only those holdings which muster majority approval may be accorded precedential value. Thus, where, as in *Berkebile*, an opinion addresses several different issues, and where no part of the opinion appears to have the approval of a majority, the opinion reflects only the personal views of its author and is not endowed with the force of law. We therefore hold that the views expressed in Chief Justice Jones' opinion in *Berkebile* are not the law of Pennsylvania, and that it is proper to instruct a jury that it must find that a defective condition be unreasonably dangerous to the user or consumer. Accordingly, plaintiff's motion for a new trial is denied." 402 F.S. 1268, 1277.

In her petition in this Honorable Court, petitioner cites several other Pennsylvania decisions which, she contends, preclude the use of the phrase "unreasonably dangerous" in a charge to the jury in a §402A case. An analysis of these decisions reveals, however, that such is not the case.

Petitioner relies upon an unreported opinion of the Court of Common Pleas of Allegheny County in *Azzarello v. Black Brothers Co., Inc.*, No. 924 April Term, 1972, affirmed *per curiam without opinion*¹⁰ by the Superior Court of Pennsylvania, 240 Pa. Super. 956, 359 A.2d 897 (1976). The lower court in *Azzarello* ordered a new trial in a product case wherein the trial judge, in the opinion he wrote in the lower Court (see Appendix hereto), stated that he charged the jury that unreasonably dangerous "is the key phrase in this type of case"; that "the focal issue" was whether the lack of safety devices "created an unreasonable danger to the operator"; that the "test of unreasonably dangerous is whether a reasonable

¹⁰ At page 7 of her petition to this Honorable Court petitioner refers to a "per curiam opinion" of the Pennsylvania Superior Court in *Azzarello*. In fact, there was no Superior Court opinion, but only an order.

manufacturer would continue to market his product in the same condition." Clearly, no such instructions were given in the instant case. Moreover, in Pennsylvania the trial judge has great discretion in deciding whether or not to award a new trial. It has been stated that the granting of a new trial is an inherent power and immemorial right of the trial Court and an appellate Court will not find fault with the exercise of such authority in the absence of a clear abuse of discretion. *Micozzi v. Klysh*, 207 Pa. Super. 77, 215 A.2d 263 (1963). The granting of a new trial in a trespass action because the judge feels he did not properly instruct the jury does not constitute an abuse of discretion. *Mohr v. Plotkin*, 186 Pa. Super. 615, 142 A.2d 414 (1958). Furthermore, Pennsylvania appellate Courts have stated on numerous occasions that the presumption is that the trial Court was justified in granting a new trial even when the reason given is insufficient, unless it is expressly stated to be the only reason. *Bellettiere v. City of Philadelphia*, 367 Pa. 638, 81 A.2d 857 (1951); *Mohr v. Plotkin*, *supra*; *Seidel v. Borough of Yeadon*, 19 Pa. Super. 370, 155 A.2d 370 (1959). A Pennsylvania appellate Court may affirm the judgment of the lower Court if it is correct on any legal ground or theory disclosed by the record, regardless of the reason advanced by the trial Court or even if the appellate Court does not necessarily agree with the reasons for the trial Court's judgment. *Moss Rose Manufacturing Co. v. Foster*, 226 Pa. Super. 448, 314 A.2d 25 (1973). A treatise on Pennsylvania law states in part:

"The fact that the court, in granting a new trial, refers to certain reasons for its action will not be treated on appeal as conclusive that the matters referred to alone controlled the decision, even though only a single question or point in the case is indicated or referred to." 9 Standard Pennsylvania Practice, pp. 407-408.

Thus, in view of the well-established principles cited above, it is not surprising that in the *Azzarello* case the action of the lower Court in granting a new trial was affirmed by the Superior Court, 240 Pa. Super. 956, 359 A.2d 897 (1976). The Superior Court affirmance was by *per curiam* order with no opinion whatsoever. Absent an express opinion by the judges of the Superior Court it cannot be said that their order in *Azzarello* represents anything more than their decision that the lower Court did not commit a palpable abuse of discretion in awarding a new trial in that particular case, for whatever reason. The case obviously presented the Superior Court with an opportunity to write an opinion on the questions raised as a result of Chief Justice Jones' opinion in *Berkebile*, *supra*, but, curiously, the Superior Court declined the opportunity.

It is respectfully submitted, that the mere order, without opinion, of the Superior Court affirming the award of a new trial in the *Azzarello* case cannot be construed as a definitive pronouncement of a change in the law of Pennsylvania as it clearly existed prior to said order. In this regard, the Court's attention is respectfully invited to the following discussion in 9 Standard Pennsylvania Practice:

"Generally speaking, an appellate court reviews judgments and decrees and not the reasons on which they are based. In many cases, if the judgment or decree of the lower court is correct it is of little moment what led up to it, and the reasons given by the trial judge for arriving at it are unimportant.

"Although it is a general rule of practice that a point not presented to the court below cannot be urged on appeal to obtain a reversal, it is equally well established that a correct judgment will be sustained for any reason which supports it, particularly where the ground was for-

mally presented to the trial court, though not there acted on. Hence if, for any reason presented by the record, the decree appealed from can be supported, it should be upheld even though the lower court has failed to assign such reason for it or even though it has given no reason whatever for the decree.

"An appellate tribunal looks at the merits of a decree or judgment brought before it for review and will not reverse merely because some or all of the reasons relied on by the court below are not tenable. In other words, a bad reason does not invalidate a good ruling and a good judgment will be affirmed although the reasons given for it by the court below may be wrong." 9 Standard Pennsylvania Practice, p. 496. (Footnotes omitted.)

It is clear that the trial court's opinion in *Azzarello* is not binding on this Court because a decision of a Pennsylvania Common Pleas Court is not binding upon a federal Court in a diversity case. *King v. Order of United Commercial Travelers of America*, 333 U.S. 153, 68 S. Ct. 488, 92 L.Ed. 608 (1948); *Berkshire Land Co. v. Federal Security Co.*, 199 F.2d 438 (C.A. 3, 1952). A Pennsylvania Common Pleas Court decision is not even binding on another Pennsylvania Common Pleas Court.

The Pennsylvania Supreme Court, while the instant appeal was pending in the Court of Appeals, granted allocatur in the *Azzarello* case, but as of the present time has not heard argument thereon.¹¹ The *Azzarello* case, therefore, cannot be

¹¹ Footnote 5 of petitioner's petition in this Court seems to suggest the Court of Appeals should have awaited the Pennsylvania Supreme Court decision in *Azzarello* before deciding the instant case. This is somewhat ironic in view of the fact that petitioner's counsel also represents the plaintiff in *Azzarello* but it was counsel for respondent Caterpillar *not* counsel for petitioner who advised the Court of Appeals of the grant of allocatur in *Azzarello* (See letter dated March 21, 1977 from Robert S. Grigsby to Clerk of the Court of Appeals in Appendix).

said to preclude a federal Court in Pennsylvania from using the phrase "unreasonably dangerous" in a charge to the jury in a product case.

Petitioner's contention that the opinions in *Lenkiewicz v. Lange*, 242 Pa. Super. 87, 363 A.2d 1172 (1976), *Cornell Drilling Co. v. Ford Motor Company*, 241 Pa. Super. 129, 359 A.2d 822 (1976), and *Francioni v. Gibsonia Truck Corp.*, . . . Pa. . . ., 372 A.2d 736 (1977) preclude the use of the phrase "unreasonably dangerous" is likewise without merit. The Pennsylvania Superior Court in *Lenkiewicz*,¹² *supra*, and *Cornell*, *supra*, cites the *Berkebile* opinion, as well as other earlier opinions, for certain well-established principles of law regarding product liability, all of which principles were established *before Berkebile*. Neither *Lenkiewicz* opinion (there are two, including the concurring opinion) discusses, directly or indirectly, the issue of the effect of the words "unreasonably dangerous" as contained in §402A. Nor does the opinion in the *Cornell* case discuss the "unreasonably dangerous" aspect in connection with §402A, although the opinion cites *Berkebile* for other basic principles applicable to a product liability case. The mere citation of *Berkebile* by another appellate Court, especially for specific principles which are well established and which have been enunciated in prior cases likewise cited, is not authority for the proposition petitioner advances, *i.e.*, that the later Court adopts the *Berkebile* opinion *in toto*. And petitioner concedes (at page 10 of her petition) that the *Berkebile* opinion is not even cited by the Pennsylvania Supreme Court in its opinion in the *Francioni* case, *supra*. With respect to that case also, petitioner points to no discussion of the "unreasonably dangerous" language contained in §402A.

¹² As in *Berkebile*, the opinions in *Lenkiewicz* are less-than-majority opinions and thus not clearly definitive pronouncements of Pennsylvania law in any event.

In short, the recent Pennsylvania cases cited by petitioner do indeed stand for the proposition (established before *Berkebile*)¹³ that plaintiff's burden in a product case is to establish (1) that a defect existed in the product at the time of delivery by the seller and (2) that the defect was a proximate cause of the plaintiff's harm. The trial judge in the instant case was clearly guided by these principles as his instructions to the jury indicate. The first interrogatory submitted to the jury was in accord with these principles:

"Was the Caterpillar 988 Wheel Loader in a defective condition at the time it was sold . . .?"

After an extended trial the fact finders answered that interrogatory in the negative. The judgment entered for defendant upon that finding was properly affirmed by the Court of Appeals for the Third Circuit. It is respectfully submitted that petitioner has failed to demonstrate that the Court of Appeals' decision in the instant case was in conflict with applicable Pennsylvania law. Respondent Caterpillar Tractor Company further respectfully submits that petitioner's petition for writ of certiorari should therefore be denied.

¹³ See, for example, *Kuisis v. Baldwin Lima Hamilton*, 457 Pa. 321, 319 A.2d 914 (1974); *Oehler v. Davis*, 223 Pa. Super. 333, 298 A.2d 895 (1972).

Conclusion

Neither the opinion of two justices of the Pennsylvania Supreme Court in *Berkebile v. Brantly Helicopter Corp.*, *supra*, nor the opinions in *Azzarello v. Black Brothers Co., Inc.*, *supra*, *Lenkiewicz v. Lange*, *supra*, *Cornell Drilling Co. v. Ford Motor Co.*, *supra* and *Francioni v. Gibsonia Truck Co.*, *supra*, compel this Honorable Court to grant certiorari. The decision of The United States Court of Appeals for the Third Circuit in the instant case was a proper one and fully in accord with applicable Pennsylvania law.

Respectfully submitted,

ROBERT S. GRIGSBY,
JANET N. VALENTINE,
THOMSON, RHODES & GRIGSBY,
Attorneys for Respondent,
Caterpillar Tractor Company.

APPENDIX

**Complete text of letter from Robert S. Grigsby,
Esquire, to T. F. Quinn, Clerk of the United States
Court of Appeals for the Third Circuit dated
March 21, 1977.**

THOMSON, RHODES & GRIGSBY
Attorneys at Law
1724 Frick Building
Pittsburgh, Pennsylvania 15219

412-281-0737

March 21, 1977

Re: Bunn vs. Caterpillar Tractor Co., et al.
No. 76-2083. Our File No. 9667-74.

T. F. Quinn, Esquire, Clerk
United States Court of Appeals
For the Third Circuit
21400 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia, Pennsylvania 19106

Dear Mr. Quinn:

This office represents appellee Caterpillar Tractor Co. in
the above appeal.

Counsel for appellant in this case relies very heavily in his
original brief upon an unreported decision of Judge George

Appendix—Complete text of letter, etc.

Ross of the Court of Common Pleas of Allegheny County in
the case of *Azzarello v. Black Brothers Co., Inc.*, which decision
was affirmed per curiam without opinion by the Pennsylvania
Superior Court at . . . Pa. Super. . . ., 359 A.2d 897 (1976).
Counsel for appellant herein also represents the plaintiff in
the *Azzarello* case and he attached copies of Judge Ross'
opinion and the Superior Court order in that case to his
original brief.

This is to advise that we have just learned that the Pennsyl-
vania Supreme Court granted allocatur in the *Azzarello* case
on February 9, 1977 and that an appeal has been entered in
the Pennsylvania Supreme Court at No. 105 March Term,
1977.

We believe the attention of the Court should be invited to
this important recent development in the *Azzarello* case and in
a telephone call to your office were advised that this letter
would be the appropriate means to accomplish this. If this in-
formation is incorrect, please let us know immediately.

Thank you very much for your courtesy and cooperation.

Very truly yours,

ROBERT S. GRIGSBY.

RSG:rk

cc: John E. Evans, Jr., Esquire
H. Fred Mercer, Esquire

Complete text of opinion of Court of Common Pleas of Allegheny County, Pennsylvania, in *Azzarello v. Black Brothers Co., Inc.* at No. 924 April Term, 1972 (filed December 10, 1975).

IN THE COURT OF COMMON PLEAS
of Allegheny County, Pennsylvania

Civil Division

ORCA C. AZZARELLO,

Plaintiff,

vs.

THE BLACK BROTHERS CO., INC.,
a corporation,

Defendant,

vs.

PARTS PROCESSING, INC., a corporation,
Additional Defendant.

No. 924 April Term, 1972
In Trespass
(Filed December 10, 1975.)

Before: Doyle, Louik and G. Ross, JJ.

G. Ross, J.

The above captioned matter was tried before the Honorable George H. Ross and resulted, on April 9, 1975, in a verdict in

Appendix—Complete text of opinion, etc.

favor of the plaintiff, Orca C. Azzarello, in the sum of \$125,000.00 against the additional defendant, Parts Processing, Inc. (Parts Processing), and a verdict in favor of the original defendant, The Black Brothers Co., Inc. (Black Brothers). Parts Processing was the employer of the plaintiff. At present, this matter is before this Court en Banc on the plaintiff's motion for a new trial.

In support of the aforesaid motion, plaintiff asserts the following two contentions: (1) the trial court gave inconsistent instructions with respect to the possibility of a joint verdict against both Parts Processing and Black Brothers; and (2) in light of the recent case of *Berkebile v. Brantly Helicopter Corporation*, . . . Pa. . . ., 337 A.2d 893, filed May 19, 1975, the trial court incorrectly instructed the jury that the plaintiff had the burden to establish, under §402A strict liability, that the allegedly defective machine was unreasonably dangerous.

We will first focus upon plaintiff's second contention, as set forth above.

In *Berkebile*, supra, at page 900 of the Atlantic Reporter, Chief Justice Jones writes:

We hold today that the "reasonable man" standard in any form had no place in a strict liability case. The salutary purpose of the "unreasonably dangerous" qualification is to preclude the seller's liability where it cannot be said that the product is defective; this purpose can be met by requiring proof of a defect. To charge the jury or permit argument concerning the reasonableness of a consumer's or seller's actions and knowledge, even if merely to define "defective condition" undermines the policy considerations that have led us to hold in *Salvador* that the

Appendix—Complete text of opinion, etc.

manufacturer is effectively the guarantor of his product's safety. The plaintiff must still prove that there was a defect in the product and that the defect caused his injury; but if he sustains this burden, he will have proved that as to him the product was unreasonably dangerous. It is therefore unnecessary and improper to charge on "reasonableness".

Clearly, the *Berkebile* case precludes the inclusion of the phrase "unreasonably dangerous" when referring to what a plaintiff must establish in a §402A action. Although, as Black Brothers argues, *Berkebile* may not be a "majority" opinion, we must still apply its precepts to the instant controversy.

An examination of the court's charge indicates that the phrase "unreasonably dangerous" was frequently mentioned and appears in the transcript as follows:

- (1) "... one who sells any product in a defective condition, unreasonably dangerous to the user, is subject to liability ..." (T.8)
- (2) "... the plaintiff must prove that the defendant sold the product involved in a defective condition, unreasonably dangerous to the user ..." (T.9)
- (3) "By a defective condition is meant that the product at the time it leaves the seller's hands in a condition not contemplated by the ultimate user, which will be unreasonably dangerous to him, and you will hear all during this charge the phrase unreasonably dangerous, and that is the key phrase in this type of case." (T.10)
- (4) "A properly made product is defective if its design is unreasonably dangerous. The prevailing interpretation

Appendix—Complete text of opinion, etc.

of defective is that the product does not meet the reasonable expectations of the ordinary consumer as to its safety." (T.11)

(5) "...a manufacturer may be liable under 402A for a design which creates an unreasonable risk of danger to the user. ...but the design is considered defective only if the design makes the product unreasonably dangerous. Hence, the focal issue in this case is whether or not the absence of infeed guards or the safety devices on the machine, ...created an unreasonable danger to the operator." (T.12)

(6) "The focal issue in these cases is whether the absence of safety devices created an unreasonable danger to the operator." (T.12, 13)

(7) "It is reasonable to require reasonable care to protect even the buyer himself or the user from what may be foreseen as an unreasonable danger to him. Unreasonably dangerous to the user or consumer is the nature of the defective condition. The product must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it or uses it with the ordinary knowledge common to the community as to its characteristics. The test of unreasonably dangerous is whether a reasonable manufacturer would continue to market his product in the same condition ..." (T.14)

In addition to the above instances, said phrase appeared in plaintiff's points for charge number one; and also appeared in original defendant, Black Brothers', points for charge number two.

Appendix—Complete text of opinion, etc.

The plaintiff took a general exception and also took a specific exception, as set forth immediately below, on an aspect of contributory negligence, which embodied the correct statement of the law with respect to the plaintiff's burden of proof:

"I ask the court to instruct the jury that plaintiff is entitled to recover from Black Brothers if the jury determines that the machine was defective and that she was injured as a proximate result of that condition, even though she were guilty of fault or contributory negligence and such would not be a bar to her right of recovery against Black Brothers." (T.50, 51)

Black Brothers argues in opposition that the above specific exception was insufficient because it was directed, not to the "unreasonably dangerous" issue, but, rather, was directed to the issue of contributory negligence. Furthermore, submits Black Brothers, the case of *Dilliaine v. Lehigh Valley Trust Company*, 457 Pa. 225, 322 A.2d 114 (1974) eliminated the doctrine of basic and fundamental error, and now a specific exception must be taken to an allegedly erroneous jury instruction. Since no such exception was taken, Black Brothers urges the conclusion that the plaintiff was satisfied with the court's charge on the then known law.

We look to the case of *Kuchinic v. McCrory*, 422 Pa. 620 (1966), for guidance. *Kuchinic* involved an airplane crash which caused the death of several passengers. Suit was commenced against the estate of the pilot. Pursuant to the then prevailing Pennsylvania law of conflicts, Georgia law, which required a showing of gross negligence by a guest passenger, was applied. The plaintiffs were unsuccessful. The in-

Appendix—Complete text of opinion, etc.

tervening decision of *Griffith v. United Airlines*, 416 Pa. 1 (1964) changed the law of conflicts in Pennsylvania and, under this change, Pennsylvania law, which placed a lesser burden on guest passengers, that of simple negligence, would be applicable in *Kuchinic*. No specific exception had been taken by the plaintiffs. On appeal, plaintiffs raised the issue of the change in Pennsylvania law. The defendant-appellee argued that plaintiffs were precluded from challenging the charge of the trial court because they had agreed to the application of Georgia law. In response to this the Supreme Court wrote, on page 626 of *Kuchinic*, *supra*, granting plaintiffs a new trial:

... the present case, of course is one where an earlier objection would have been to no avail, because the charge correctly stated prevailing law. Furthermore, the rule espoused by appellee would compel counsel to urge upon the trial court every conceivable theory, on the mere chance that, before his case is finally concluded one such theory might become the law. Since, by hypothesis, the trial court would have to overrule any objection based on his failure to adopt one of these theories, on appeal, the winning party below would be in the same position as the instant appellee. Indeed this requirement would tend to delay justice, for the court below would still have to consider the rule on each theory. Therefore, we are unwilling to conclude that the appellants' failure to interject the rationale of *Griffith* into the trial constitutes waiver and precludes them from now seeking the benefit of that decision.

In the instant controversy, as in *Kuchinic*, *supra*, the plaintiff-appellant's failure to take a specific exception to the trial

Appendix—Complete text of opinion, etc.

court's use of the phrase "unreasonably dangerous" and thereby inject the *Berkebile* decision, cannot be viewed as a waiver because, such an exception, even if properly taken, would have been for naught.¹ Therefore, plaintiffs are not precluded from presently asserting the *Berkebile* decision. As indicated heretofore, the phrase "unreasonably dangerous" appeared frequently in the charge of the trial court, and it cannot be and it has not been asserted that said phrase was an insignificant factor in the deliberations of the jury. Consequently, on the basis of the foregoing, it is the conclusion of this Court, that the plaintiff must be granted a new trial to correct the erroneous charge below. Accordingly, an order will be entered reflecting this conclusion.

In light of the aforesaid, it is unnecessary to address the first contention raised by the plaintiff in support of the within motion.

¹ In *Dilliplaine*, supra, the Supreme Court reasoned, at page 116 of the Atlantic Reporter, that, "Requiring a timely specific objection to be taken in the trial court will ensure that the trial judge has a chance to correct alleged trial errors. This opportunity to correct alleged errors at trial advances the orderly and efficient use of our judicial resources." In the instant case, a timely objection based on a change in the law yet to occur, in addition to being futile (as pointed out in *Kuchinic*, supra), would demand a clairvoyant ability beyond that of even the most skilled advocate.

*Appendix—Complete text of opinion, etc.**ORDER OF COURT*

AND NOW, to-wit, this 9th day of Dec., 1975, after oral argument and full consideration of the briefs submitted by the parties, it is hereby ORDERED, ADJUDGED and DECREED that the Motion of the plaintiff, Orca C. Az-zarello, for a New Trial is granted.

By the Court:

G. ROSS, J.

Eo die, Exceptions noted to all parties and bill sealed.

G. Ross, J.